HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE

AND

HON'BLE SHRI JUSTICE G.BHAVANI PRASAD

WRIT PETITION No. 3824 of 2006

Between:

M/s Sri Anitha Traders, D.Agraharam,

Buggagraharam, Nagari Mandal,

Chittoor Dist. and another …Petitioners

AND

The Assistant Commercial Tax Officer,

No.II (Intelligence), Tirupathi,

Chittoor District and another …Respondents

Counsel for the petitioner: Shri M.V.J.K.Murthy for

Shri M.V.J.K.Kumar

Counsel for the Respondents: Govt. Pleader for Commercial Taxes

Dated: March 20, 2006

ORDER:

Per G.S.Sighvi, C.J.

This petition is directed against order dated February 25, 2006 passed by Assistant

Commercial Tax Officer, II (Int), Tirupathi Circle, Tirupathi (respondent No.1) under Section 45(7)(b) of the Andhra Pradesh Value Added Tax Act, 2005 (for short 'the Act') for confiscation of 18050 Kgs. of G.N. Seeds belonging to the petitioner.

It is borne out from the record that the petitioners had earlier filed Writ Petition No. 3133 of 2006 questioning the detention of the goods which were being transported in vehicle bearing No. TN 23 H 1147. The same was disposed of by the Division Bench on February 22, 2006 with the direction to the officer concerned to consider the application made by the writ petitioners for release of the vehicle and decide the same within 24 hours. The relevant extracts of that order are reproduced below:

> "In our opinion, it is not necessary to adjudicate on the legality of the impugned notices because we feel that ends of justice would be met by directing Assistant Commercial Tax Officer-II, Intelligence, Tirupati, to consider the application made by the petitioners for release of the vehicle and decide the same within 24 hours from today. If the petitioners reiterate their undertaking to pay the tax due, then there should be no impediment in the release of the vehicle.
>
> With the above directions and observations, the writ petition is disposed of.
>
> While disposing of the writ petition in the manner indicated above, we make it clear that the aforementioned direction shall not absolve the petitioners of any other liability, which they may have incurred on account of violation of the provisions of the Act and the Rules."

In compliance of the directions given by the Court, respondent No.1 passed the impugned order whereby he confiscated the goods under Section 45(7)(b) of the Act. The ratio and reason of that order read as under:-

> "I have carefully gone through the said orders of the Hon'ble court dated 22-2-2006. The same is clearly revealing that this W.P. is not against the confiscation notice issued by me on 17-2-2006. It is only with reference to the notice in VAT Form.603 dated 13-2-2006. At the end of the said orders their lordships held as under:-

> "We make it clear that the aforementioned direction shall not absolve the petitioners of any other liability, which they may have incurred on account of violation of the provisions of the Act and Rules."

Thus these orders are of no application to the proposals made in the Seizure-cum-Confiscation show cause notice dated 17-2-2005 issued by me and the liability incurred by the dealer under Section 45 (7)(b) of the APVAT Act, 2005. On 24-2-2006 also the dealer had personally come and represented his case before me. But he did not choose to file any written objections. He had only stated that in view of the orders of Hon'ble Court dated 22-2-2006, which is not related to this seizure-cum-Confiscation show cause notice dated 17-2-2006, the G.N.Seeds under dispute are required to be released if he deposits TOT at the rate of 1%. The same cannot be countenanced in view of the fact that the offence constituted in Section 45 (7)(a) of the APVAT Act 2005 is a distinct difference and separate offence from that of Section 45 (7)(b) of the APVAT Act 2005 under which I have issued seizure-cum-confiscation show cause notice issued on 17-2-2006 and hence his request to release the G.N.Seeds by accepting 1% TOT under Section 45 (7)(a) of the APVAT Act, 2005 cannot be accepted and hence the same is over ruled. The notice in Form.603 is issued under Section 43 of the APVAT Act 2005 read with Rule 53 of the APVAT Rules, 2005.

Even in personal hearing on 24-2-2006 he had requested to pass some orders so that he would take recourse to the appeal as provided for under the provisions of the APVAT Act 2005.

The dealer did not raise any other objections; nor he had filed any documentary evidence in support of his contentions.

In the light of the above, all the objections raised by the dealer are over ruled and all the proposals made in the seizure-cum-confiscation show cause notice are confirmed in toto. I hereby confiscate the entire quantity of 18050 Kgs. of G.N.Seeds worth Rs.3,61,000/- in favour of the Government of Andhra Pradesh under Section 45 (7)(b) of the APVAT Act 2005."

Sri M.V.J.K.Murthy, learned counsel for the petitioners fairly admits that the order impugned in the writ petition is appealable in terms of Section 31 of the Act, but argued that his clients should not be non-suited on the ground of availability of

alternative remedy, because they have questioned the jurisdiction, power and authority of respondent No.1 to initiate action under Section 45 (7) of the Act. He further argued that respondent No.1 committed a jurisdictional error by confiscating the goods without considering the plea of the petitioners that they had not violated the provisions of the Act. Learned counsel then submitted that in view of the direction given by the Court in Writ Petition No. 3133 of 2006, the officer concerned did not have any option except to release the goods. He further submitted that order of confiscation should be quashed because it is based on extraneous considerations and reflects total non-application of mind by the officer on the issue of violation of the provisions of the Act by the petitioners.

We have thoughtfully considered the submission of the learned counsel, but have not felt persuaded to agree with him that the writ petition should be entertained notwithstanding the availability of statutory alternative remedy of appeal. It is true that Article 226 of the Constitution, does not, in terms, contain any limitation on the power of the High Court to issue writ, order or direction including writs in the nature of writ of mandamus, prohibition, certiorari, quo-warranto and habeas corpus, but in the last 56 years, the Courts have evolved several rules of self-imposed restraint including the one that the High Court will not entertain writ petition under Article 226 of the Constitution if an effective alternative remedy is available to the petitioners. This rule has been applied with greater rigour in cases involving challenge to the proceedings initiated by the public authorities for levy and recovery of taxes, fees, cess etc. The consistent view of the courts is that if the statute under which action is taken by the public authority for imposition of tax etc., and recovery thereof and other related matters, a statutory remedy is available to the aggrieved person, then he/she should be allowed to avail that remedy and the High Court should not directly entertain the writ petition filed under Article 226 of the Constitution of India.

In **A.V. Venkateshwaran v. R.S. Wadhwani** the Constitutional Bench of the Supreme Court while reiterating the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, exhaust the other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition but is a rule evolved by the Courts for the exercise of their discretion, observed as under:

> “The wide proposition that the existence of an alternative remedy is a

bar to the entertainment of a petition under Art.226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other cases, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

In **Thansingh Nathmal v. Superintendent of Taxes** another Constitutional Bench of the Supreme Court considered the question relating to exercise of discretion by the High Court in entertaining a writ petition despite the availability of alternative remedy and held:

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High

> Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

In **Baburam v. Zilla Parishad** the Supreme Court reiterated the rule of alternative remedy in the following words:

> "When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted."

Two exceptions to the above rule carved out by the Supreme Court are:-

1. where proceedings are taken before a Tribunal under a provision of law, which is ultra vires to the Constitution,
2. where the impugned order has been made in violation of the rules of natural justice.

In **Champa Lal v. I.T. Commissioner**, **J.M. & Co. v. Agricultural I.T. Officer, Assam**, **C.I.T. v. Ramendra Nath Ghosh**, **Swadeshi Cotton Mills Co. Ltd., v. Government of U.P.**, **Gujarat University v. N.U. Rajguru**, **State of H.P. v. Raja Mahendra Pal**, **L.L. Sudhakar Reddy v. State of A.P.**, **State of Bihar v. Jain Plastics & Chemicals Ltd.,**, **Harbanslal Sahnia v. Indian Oil Corporation Ltd.,**, **ABL International Ltd., v. Export Credit Guarantee Corporation of India Ltd.,** the Supreme Court applied the rule of alternative remedy in different situations. In **Harbanslal Sahnia**[12] (supra) the Supreme Court considered the situations in which the High Court can exercise under Article 226 of the Constitution of India

notwithstanding the availability of alternative remedy and held:

> "The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: *i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See ***Whirlpool Corpn.*** **v.** ***Registrar of Trade Marks {(1998) 8 SCC 1}***. The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

In **Titaghur Paper Mills Co. Ltd. v. State of Orissa** the Supreme Court laid down the rule of alternative remedy in the following words:

> " Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute alone must be availed of. Under the scheme of the Orissa Sales Tax Act, there is a hierarchy of authorities for granting redress. The petitioners had an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. The Act provides for an adequate safeguard against an arbitrary or unjust assessment, such as right to prefer appeal under Section 23 (1) and to apply for stay of recovery under clause (a) of the second proviso to Section 13 (5). Thus the Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226.

In **Assistant Collector, Central Excise v. Dunlop India Ltd.** the Supreme Court referred to some earlier judgments, including the one of **Titaghur Paper Mills Co. Ltd. v. State of Orissa** (supra) and held:

> "Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication

of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

The rule enunciated in **Titaghur Paper Mills Co. Ltd. v. State of Orissa** (supra) was reiterated in **State of Goa v. Leukoplast (India) Ltd.**

In the present case, the petitioners have not questioned the constitutionality of the A.P. Value Added Tax Act, 2005. They have also not pleaded that the impugned order has been passed in violation of the rules of natural justice i.e., the rule of audi alteram partem. The only substantive plea raised by them is that the action of the Assistant Commercial Tax Officer to confiscate the goods is without jurisdiction.

In the context of the petitioners' challenge to the impugned order on the ground of lack of jurisdiction of the Assistant Commercial Tax Officer concerned, we enquired from the learned counsel that whether in reply to the show-cause notice, his clients raised any objection to the jurisdiction of the officer to initiate action under Section 45 (7) of the Act. To this, learned counsel replied in the negative. He, however, insisted that failure of his clients to object to the jurisdiction of the Assistant Commercial Tax Officer will not clothe him with the power to decide the question of confiscation of goods. In our view, by having refrained from questioning the authority of the Assistant Commercial Tax Officer to take action under Section 45 (7) of the Act, the petitioners will be deemed to have waived of their right to object the jurisdiction of the officer concerned. If the notice issued by the officer had resulted in a favourable order, then the petitioners would certainly have not questioned the same. This only shows that they had taken a calculated chance to persuade the officer concerned to pass favourable order and have moved the Court only when they found that the officer has ordered confiscation of the goods.

We are of the further view that the remedy of appeal available to the petitioners under Section 31 of the Act is an effective alternative remedy. In the appeal, the petitioners can challenge the legality of order dated February 25, 2006 on all available grounds including the one that the officer did not have the jurisdiction to order confiscation of the goods by exercising power under Section 45 (7)(b) of the Act. Therefore, there is no extraordinary reason for making a departure from the settled law that the High Court will not entertain writ petition under Article 226 of the Constitution of India if an effective alternative remedy is available to the petitioner.

For the reasons mentioned above, the writ petition is dismissed leaving the petitioners free to avail the alternative remedy of appeal. We also direct that if the petitioners file appeal within next seven days, then the same shall be entertained, heard and decided on merits.

As a sequel to the dismissal of the writ petition, WPMP.No.4764 of 2006 filed by the petitioners for issuance of a direction to the respondents to release the goods is also dismissed.

G.S.SINGHVI, C.J.

March 20, 2006

G.BHAVANI PRASAD, J.

GRR/ARS